

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
CHARLES F. AND LOIS L. BARBER	:	DETERMINATION
	:	DTA NO. 810515
for Redetermination of Deficiencies or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under the	:	
Administrative Code of the City of New York	:	
for the Years 1986 and 1987.	:	

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Petitioners, Charles F. and Lois L. Barber, 66 Glenwood Drive, Greenwich, Connecticut 06830, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under the Administrative Code of the City of New York for the years 1986 and 1987.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 10, 1993 at 9:15 A.M. Petitioners filed their brief on April 29, 1993, the Division of Taxation filed its brief on June 1, 1993 and petitioners filed their reply brief on June 14, 1993. Petitioners appeared by Breed, Abbott & Morgan, Esqs. (Edward H. Hein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether certain payments received by petitioner Charles F. Barber, a nonresident of New York, from his former New York employer, were annuity payments so as to be properly excluded from petitioners' New York source income.

FINDINGS OF FACT

Petitioner's proposed findings of fact are included herein.

Petitioners, Charles F. and Lois L. Barber, timely filed New York State income tax returns for 1986 and 1987 (Form IT-203) as full-year nonresidents. The returns were filed

jointly by petitioners<sup>1</sup> and, at line 10 (1986) and line 9 (1987), reported for Federal purposes taxable pensions, IRA distributions and annuities in the amount of \$256,038.00. This figure is comprised of amounts paid to petitioner by his former employer as follows: the amount of \$126,088.00 was reported on a Statement of Annuities, Pensions, Retired Pay or IRA Payments (Form W-2P) and the amount of \$129,950.00 was reported on a Wage and Tax Statement (Form W-2). The amount reported and the method of reporting were the same for both years. Petitioner reported none of these payments as New York source income subject to New York State and City taxation, contending that the full amount of these payments constituted an annuity, which was not New York source income.

On May 2, 1990, following an audit, the Division of Taxation ("Division") issued to petitioner two statements of personal income tax audit changes for the years 1986 and 1987. For the year 1986, the statement asserted additional tax due in the amount of \$6,644.19, consisting of New York State tax in the amount of \$6,015.59 and New York City tax in the amount of \$628.59. For the year 1987, the statement asserted additional tax

due in the amount of \$7,120.09, consisting of New York State tax in the amount of \$6,476.01 and New York City tax in the amount of \$644.08. The calculation of the additional tax was premised primarily upon the Division's position that the amount of \$129,950.00 reported as an annuity in both years was New York source income properly subject to New York State and City of New York taxation. Other adjustments made by the Division are not at issue in this matter.

On July 23, 1990, the Division issued to petitioner two notices of deficiency asserting, in the aggregate, additional personal income tax due for 1986 and 1987 in the amount of \$13,764.28, plus interest. The notices of deficiency followed and were issued upon the same

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<sup>1</sup>Petitioner Lois L. Barber's name appears in this proceeding solely by virtue of the fact that petitioners filed joint returns. There is no claim that Mrs. Barber received compensation subject to New York State or City taxes. Hence, all references to "petitioner" shall be references to petitioner Charles F. Barber only.

basis as the above-described statements of personal income tax audit changes.

On November 22, 1991, the Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order to petitioner indicating tax due for the year 1986 of \$5,518.10, consisting of New York State personal income tax of \$4,949.43 and City of New York personal income tax of \$568.67. For the year 1987, the Conciliation Order indicated tax due of \$6,047.22, consisting of New York State personal income tax of \$5,465.03 and City of New York personal income tax of \$582.19. The reduction in the personal income tax due was based upon an adjustment to the average ratio employed for pensions and other retirement benefits received by employees whose services were performed partly within and partly without New York State.

Petitioner was a nonresident of New York, being a resident of Connecticut during the years at issue. Petitioner holds a Bachelor of Sciences Degree from Northwestern University, a Bachelor of Law Degree from Harvard University and a Masters of Philosophy (Rhodes Scholar) from Oxford University. On April 1, 1956, petitioner joined ASARCO, Inc. ("ASARCO") as its chief legal officer (general counsel), and became its vice-president in 1959. He moved into general management as ASARCO's executive vice-president in 1963, its president in 1968 and finally its chairman and chief executive officer in 1971, a position in which he remained until his retirement at the age of 65 on April 30, 1982.

At the time of petitioner's retirement, ASARCO was one of the world's leading producers of nonferrous metals, principally silver, copper, lead and zinc. It operated mines in the United States, Canada, Peru and Bolivia, while its associated companies operated mines in Australia, Peru and Mexico. In addition to mining and treating ore from its own mines, ASARCO was a custom smelter and refiner of nonferrous metal ores mined by others. ASARCO also produced nonmetallic minerals, such as asbestos, coal and limestone, from mines in the United States and Canada.

A proxy statement dated March 10, 1981 was forwarded to all stockholders entitled to vote at an annual meeting scheduled for April 22, 1981. It was also sent to salaried employees

participating in the savings plan of ASARCO. Approximately 83% of all salaried employees participated in such plan. The statement indicated, under the heading "Retirement Plan", that ASARCO had two different plans which covered substantially all employees including all executive officers; a qualified Retirement Benefit Plan for Salaried Employees ("Pension Plan") and an unfunded Supplemental Retirement Plan ("SRP") in connection with the qualified Pension Plan.

The statement also indicated that petitioner, upon retirement, would be deemed to have had 40 years of credited service with ASARCO.

ASARCO's qualified (pursuant to Internal Revenue Code § 401[a]) Retirement Benefit Plan for Salaried Employees is a defined benefit plan with a final average earnings formula, integrated with Social Security by the offset method. The formula provided 1½% of final average earnings (i.e., average of the highest consecutive 60 months of the last 120 months worked) minus 1¼% of primary unreduced Social Security benefit payable at age 65 multiplied by years and months of credited service. The Pension Plan provided that benefits payable would not exceed the limitation prescribed in Internal Revenue Code § 415, added by ERISA. The Pension Plan was established and maintained by ASARCO in a written document during the time of petitioner's employment. ASARCO maintained the Pension Plan as far back as April 30, 1962. Under the Pension Plan, employees had a vested and nonforfeitable right to retirement benefit payments after ten years of service. The Pension Plan was communicated to salaried ASARCO employees eligible to participate. For instance, a Summary Plan Description explaining the Pension Plan and the complete text of such plan were provided, in booklet form, to active employees who participated in the Pension Plan, to those who were eligible to participate and to retired employees. The Summary Plan Description included amendments through November 2, 1977. On February 2, 1981, an addendum to the Summary Plan Description was issued to all salaried employees of ASARCO describing the amendments to the Pension Plan through July 1, 1980. One of the amendments, effective November 30, 1978, eliminated the optional lump sum form of benefit payment. Subsequently, a revised copy of the

Pension Plan was provided which included amendments through April 1, 1982.

Under ERISA, limits are imposed on the amount of annual retirement benefits payable to employees under a qualified pension plan such as ASARCO's Plan. In response, ASARCO amended the Pension Plan to conform to the ERISA limitations. However, the amendment reduced the benefits which certain employees, their surviving spouses and beneficiaries would otherwise be entitled to receive under the Pension Plan. Since ERISA allowed for the establishment of an "excess benefit plan" for the purpose of providing benefits for such employees in excess of the ERISA limitations, ASARCO established a plan so that all employees would receive total retirement benefits of the amount they would have received under the Pension Plan but for the amendment conforming the Pension Plan to ERISA.

In a document created February 27, 1976 and signed by its then chief financial officer and attested to by its then general counsel, ASARCO created the Supplemental Retirement Plan of ASARCO, Inc. ("SRP"). The purpose of the SRP was to pay to any employee the benefits otherwise payable under the Pension Plan except for the imposition of the limitations imposed by ERISA (Internal Revenue Code § 415).

The SRP provided, in part, as follows:

"NOW, THEREFORE, in consideration of past and future services of the affected employees, ASARCO hereby establishes such an excess benefit plan to be known as its Supplemental Retirement Plan ('SRP') as follows:

\* \* \*

"3. Upon application by an Employee to receive his distribution from the Pension Plan in a lump sum to which ASARCO consents, ASARCO may make or cause to be made to such Employee a payment or a series of payments under the SRP in lieu of any lump sum otherwise payable, in accordance with the last sentence of paragraph 2. Such payment or series of payments shall be the equivalent actuarial value of such lump sum amount otherwise payable based on such tables and interest rates as may be adopted from time to time for the purposes of lump sum payments under the Pension Plan.

\* \* \*

"4. ASARCO's obligation to make payments to the recipient when due shall be contractual in nature only, and the amounts of such payments shall not be held in trust for the recipient."

\* \* \*

"6. ASARCO expects to continue this SRP indefinitely but reserves the right to amend or discontinue it, if in its sole discretion, such a change is deemed necessary and desirable.

On March 16, 1981, ASARCO entered into a written agreement ("Agreement") with petitioner which assured petitioner a retirement benefit in an amount substantially the same as the amount which would be provided by the Pension Plan had petitioner been employed by ASARCO for a period of 40 years upon retirement. The Agreement further stated that payments would be paid at such times and in such form as benefits were allowable under the Pension Plan, but the form would not be limited to the form of benefits elected by petitioner under such plan, and such payments would be subject to all other terms and conditions of the Pension Plan as in existence on the date of petitioner's retirement. The Agreement was authorized by ASARCO's board of directors and executed on behalf of ASARCO by its president.

Petitioner made a written election pursuant to the Pension Plan, the SRP and the Agreement to receive his benefits in the form of an annuity payable for his life and thereafter continuing for the life of his spouse in an amount equal to half the amount payable during their joint lives. The election by petitioner of the spousal joint and survivor annuity form of benefit was made prior to his retirement, was irrevocable once he retired and covered his entire pension as determined under the Pension Plan, the SRP and the Agreement.

The benefits manager of the personnel and employee benefits department of ASARCO testified that petitioner's monthly and yearly benefits were computed prior to his retirement and were based upon the Pension Plan, the SRP and the Agreement. Upon retirement, petitioner began to receive uniform and fixed monthly payments in the amount of \$21,336.00, payable in money only. Of this monthly total, \$10,507.00 represents payments based upon the Pension Plan and \$10,829.00 represents payments based upon the SRP and the Agreement.

The vice-president of industrial relations and personnel testified that once an individual retires and receives benefits under the Pension Plan and the SRP (and in this case the Agreement), the retiree has the absolute right to continue to receive the same payments in the

same amount. The rights of the retiree are not subject to discontinuance. In addition, according to the vice-president, paragraph 6 of the SRP contains a prospective modification, which would have an effect upon benefits or provisions in the SRP only from the date of modification, with no effect on retirees. Addressing the introductory paragraph of the SRP which states, in part, "in consideration of past and future services of the affected employees", the vice-president stated that the SRP is available as a method of benefit calculation for services rendered prior to the effective date of the SRP, as well as services rendered after the effective date of the SRP. The terms "past services" and "future services" are measured from the date of the SRP, not the date of retirement. No services are required of a retired employee after retirement.

Petitioner testified that he elected the method of pension prior to his retirement date of April 30, 1982, that he receives a monthly payment of \$21,336.00, that he expects to receive that amount for life, that the amount cannot be changed by himself or ASARCO and that his retirement benefits are based upon the Pension Plan, the SRP and the Agreement. Petitioner also testified that his rights under the plans and agreement were vested and nonforfeitable.

In two letters dated May 15, 1990 and June 6, 1990, ASARCO, by its controller, addressed the question of the relationship between petitioner and ASARCO following petitioner's retirement. The letters stated that petitioner received payments under two supplemental pension plans (the SRP and the Agreement). The SRP and the Agreement are considered contractual obligations of ASARCO which incorporate the terms of the Pension Plan which, in turn, requires fixed monthly payments for the remainder of petitioner's life.

The letters further stated that ASARCO has retained the right to amend or discontinue both the Pension Plan and the SRP. The right of amendment, however, would affect only accrual of benefits. Since Pension Plan and SRP benefits, which are a function of employee salary, length of service and retirement age, are calculated at retirement, an amendment would have no effect on petitioner's rights under the Pension Plan and the SRP.

As to the Agreement, the letters indicate that it substituted 480 months in place of petitioner's actual service in both the Pension Plan and the SRP. Otherwise, it had no other

effect on petitioner's contractual right to fixed payments for life under the plans.

The \$129,950.00 yearly amount at issue consists of \$10,829.00 in monthly payments and is the result of retirement benefits paid pursuant to the SRP and the Agreement. The remaining monthly (\$10,507.00) and yearly (\$126,088.00) amounts are based upon the Pension Plan and have been accepted by the Division as an annuity.

CONCLUSIONS OF LAW

A. Tax Law former § 632, in effect for the years at issue, provided as follows:

"New York adjusted gross income of a nonresident individual. -- (a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:

"(1) The net income of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . .

"-- (b) Income and deductions from New York sources.

\* \* \*

"(2) Income from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from New York sources only to the extent that such income is from property employed in a business, trade, profession or occupation carried on in this state."

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B. 20 NYCRR former 131.4(d) provided, in pertinent part, as follows:

"(d) Pensions and other retirement benefits constituting an annuity. (1) General. Where an individual formerly employed in New York State is retired from service and thereafter receives a pension or other retirement benefit attributable to his former services, the pension or retirement benefit is not taxable for New York State personal income tax purposes if the individual receiving it is a nonresident and if it constitutes an annuity as defined in paragraph (2) of this subdivision. Where a pension or other retirement benefit does not constitute an annuity, it is compensation for personal services and, if the individual receiving it is a nonresident, it is taxable for New York State personal income tax purposes to the extent that the services were performed in New York State. The term compensation for personal services as used in the foregoing sentence includes, but is not limited to, amounts received in connection with the termination of employment, amounts received upon early retirement in consideration of past services rendered, amounts received upon retirement for consultation services, and amounts received upon retirement under a covenant not to compete. For allocation rules, see section 131.20 of this Part.

"(2) Definition. To qualify as an annuity, a pension or other retirement benefit must meet the following requirements:

"(i) It must be paid in money only, not in securities of the employer or other property.

"(ii) It must be payable at regular intervals, at least annually, for the life of



the individual receiving it, or over a period not less than half of such individual's life expectancy as of the date payments begin. For payments which begin on or after July 1, 1987, an individual's life expectancy is the expected return multiple shown for the applicable age in the table entitled 'Table V. Ordinary Life Annuities -- One Life -- Expected Return Multiples,' promulgated under section 1.72-9 of the Federal Income Tax Regulations (for payments which began before July 1, 1987, an individual's life expectancy is the expected return multiple shown for the applicable age and sex in the table entitled 'Table I. Ordinary Life Annuities -- One Life -- Expected Return Multiples,' promulgated under section 1.72-9 of the Federal Income Tax Regulations).

"(iii) It must be payable:

"(a) at a rate which remains uniform during such life or period; or

"(b) at a rate which varies only with:

"(1) the fluctuation in the market value of the assets from which such benefits are payable;

"(2) the fluctuation in a specified and generally recognized cost-of-living index; or

"(3) the commencement of social security benefits; or

"(c) in such a manner that the total of the amounts payable is determinable at the annuity starting date either directly from the terms of the contract or indirectly by the use of either mortality tables or compound interest computations, or both, in conjunction with such terms and in accordance with sound actuarial theory. The term annuity starting date in the case of any contract or plan is the first day of the first period for which an amount is received as an annuity by the individual under the contract or plan.

"(iv) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees." (Emphasis in original.)

C. Petitioner contends that he has met all the requirements of 20 NYCRR former 131.4(d) and that the benefit payments received constitute an annuity. In response, the Division claims that several of the provisions of the SRP and the Agreement negate a finding that the benefit payments qualify as an annuity.

The Division points to paragraph 6 of the SRP which allows ASARCO to amend or discontinue the SRP if, in its sole discretion, it deems it necessary and desirable to do so. According to the Division, this provision indicates that ASARCO was not bound to continue

making benefit payments at regular intervals or in such a manner that the total amount payable was determinable at the time of petitioner's retirement. Therefore, petitioner was not granted absolutely a definite sum of money, without a contingency, under the SRP, thus not qualifying as an annuity under 20 NYCRR former 131.4(d)(2)(i), (ii) or (iii). In a related argument, the Division points to paragraph 2 of the Agreement which provides that payments by ASARCO pursuant to the Agreement shall not be limited to the form of benefits elected by petitioner under the Pension Plan. Coupled with paragraph 3 of the SRP which provides for an election of a lump-sum payment, the Division contends that a lump-sum distribution could be made from the Pension Plan which violates 20 NYCRR former 131.4(d)(2)(ii) and (iii).

The Division, in determining that the SRP benefits were not an annuity, notes that paragraph 4 of such plan states that ASARCO was not required to hold in trust those benefits payable under the SRP. According to the Division, the basic function of an annuity is the systematic liquidation of a principal.

D. In response, petitioner contends that since he completed his service to ASARCO and retired, ASARCO is legally obligated to pay the benefits promised in the Pension Plan, and the SRP and Agreement which incorporate such plan; that is, petitioner's retirement rights have become fully vested. Furthermore, the testimony at the hearing indicated that petitioner's payments could not be changed. Finally, petitioner argues that the SRP must be read as an integrated whole, and as such ASARCO cannot terminate or amend any SRP benefit payable to an eligible retirement employee in pay status.

As for paragraph 6 of the SRP, which states that ASARCO is not responsible to hold benefit funds in trust, petitioner contends that an annuity agreement does not create a trust, and an annuity need not possess any element of a trust. Finally, petitioner notes that no lump-sum option was available, and, even if it had been, it would have been irrelevant since petitioner chose an annuity.

E. The SRP contains several provisions which indicate that its purpose was to supplement the retirement benefits of the Pension Plan and was, in effect, an extension of such

plan. The introductory paragraphs discuss the limits imposed by ERISA upon the Pension Plan, the reduction in benefit payments resulting from the amendment to comply with ERISA and the desire of ASARCO to provide benefits to its employees under the Pension Plan in the same amount as if such plan had not been amended to comply with ERISA. Eligibility for the SRP retirement benefits was granted to those employees whose retirement benefits under the Pension Plan were limited by ERISA to an amount less than the amount payable under such plan without the benefit amendment. Computation of the payments under the SRP were based upon amounts received under the Pension Plan and payments under the SRP were to be made at about the same time as payments were made pursuant to the Pension Plan. In effect, the SRP begins to provide retirement benefits at the point where the Pension Plan, as limited by ERISA, ceases to provide such benefits.

Based upon the testimony of the vice-president of industrial relations and personnel and petitioner, it is concluded that the term "in consideration of past and future services" contained in the SRP refers to the availability of the SRP as a method of benefit calculation for services rendered prior to the effective date of the SRP, as well as services rendered after the effective date of the SRP. The terms "past services" and "future services" are predicated from the date of the SRP, and refer to services performed both before and after its effective date of February 27, 1976. The SRP does not require services to be performed after an employee's retirement.

F. Paragraph 3 of the SRP refers to the receipt of retirement benefits in the form of a lump-sum payment, following application by the employee to receive his distribution from the Pension Plan in the same form of payment. However, effective November 30, 1978, the optional lump sum form of benefit payment was deleted.

G. The Division objects to paragraph 4 of the SRP, claiming the lack of a trust negates a finding that the benefit payments constitute an annuity. There is, however, a substantial distinction between annuities and trusts for the payment of income to beneficiaries. The primary distinction is that an annuity confers upon the beneficiary a right to a fixed and certain sum of money, whereas a trust confers upon the beneficiary an indefinite and uncertain sum of

money based upon actual income (Re Clark's Will, 54 Misc 2d 1015, 284 NYS2d 244; Re Folsom's Will, 155 NYS2d 140, affd 6 AD2d 691, 174 NYS2d 116, affd 6 NY2d 886, 190 NYS2d 381). The fundamental characteristic of an annuity is the right to a definite sum periodically at all events. The term has acquired an extended meaning that any arrangement under which a minimum stated amount is directed to be paid at stated times to the beneficiary whether under a trust or otherwise has been denominated as an annuity (Re Chamberlin's Estate, 289 NY 456; Matter of Graczyk's Will, 66 NYS2d 750; Matter of Fischer's Estate, 117 NYS2d 267; Matter of Brown's Estate, 25 Misc 2d 656, 205 NYS2d 532).

H. Paragraph 6 of the SRP, which provides that ASARCO reserves the right to amend or discontinue it if, in its sole discretion, such a change is deemed necessary and desirable, is the portion of the SRP most relied upon by the Division to establish that the benefit payments received thereunder do not qualify as an annuity. The Division contends that this paragraph indicates that petitioner may not receive fixed, uniform and regular payments for his life. According to the Division, the ability of ASARCO to cease retirement benefit payments, pursuant to the SRP, would disqualify such payments as an annuity under 20 NYCRR former 131.4(d)(2)(i), (ii) and (iii).

The early concept of a pension as a gratuity paid by the employer in recognition of past services is now virtually obsolete, and pensions and related benefits are generally recognized as a type of deferred compensation which an employer, either public or private, is obligated to pay in accordance with the terms of an applicable contract or statute, once the right thereto vests in the beneficiary (83 NY Jur 2d, Pensions and Retirement Systems, § 1). The consideration supporting the employer's promise to pay retirement benefits is the employee's forbearance from resigning and continued work over a period of years (Hadden v. Consolidated Edison Co. of N.Y., 34 NY2d 88, 356 NYS2d 249).

It is well settled that pension benefit plans are unilateral contracts which employees accept by appropriate performance (Pratt v. Petroleum Prod. Mgt. Employee Sav. Plan, 920 F2d 651 [10th Cir 1990]). Since a pension is a unilateral contract, it may not be amended or

modified retroactively by the sponsor -- after a participant has accepted the plan offer by retiring or other performance specified in the plan -- in a manner that alters or impairs the rights of participants under the term of the plan (Pratt v. Petroleum Prod. Mgt. Employee Sav. Plan, supra; Carr v. First National Bank, 816 F Supp 1476 [ND Cal 1993]).

An employee who performs the acts and completes the services stipulated in the employer's pension plan thereby consummates a unilateral contract vesting in him an indefeasible right to the retirement benefits. Therefore, under established contract principles, vested retirement rights may not be altered without the pensioner's consent (Chemical Workers v. Pittsburgh Glass, 404 US 157, 181, n. 20, 30 L Ed 2d 341, 92 S Ct 383; Silfen v. Whelan, 30 AD2d 523, 290 NYS2d 417; Scoville v. Surface Transit, 39 Misc 2d 991, 242 NYS2d 319).

The Agreement, like the SRP, between petitioner and ASARCO is directly tied into the Pension Plan. The purpose of the Agreement is to assure that petitioner's retirement benefit is substantially the same as the amount which would be provided by the Pension Plan had petitioner been employed by ASARCO for a period of 40 years upon retirement. The amounts are to be paid at such times and in such form as benefits are allowable under the Pension Plan.

ASARCO's position concerning the amendment of the SRP is consistent with case law. ASARCO's position, as presented by two uncontradicted letters of ASARCO's controller, the credible testimony of the chairman and chief executive officer (petitioner) and the credible testimony of the vice-president of industrial relations and personnel are that the SRP and the Agreement are contractual obligations of ASARCO which cannot now be altered. Both incorporate the terms of the Pension Plan which requires fixed monthly payments for the remainder of petitioner's life. Furthermore, the right of amendment would affect only accrual of benefits. A plan benefit is a function of employee salary, length of service and retirement age, and is currently calculated at retirement. Since petitioner was already retired, any amendment to the SRP would have no effect on his rights under the SRP.

Therefore, once petitioner retired, he had an absolute right to receive retirement benefit payments based upon his years of service, salary and age. When the amount of his retirement

benefit payments were computed, petitioner was and is entitled to receive the monthly benefit payment for the remainder of his life. These rights are not subject to discontinuance and any modifications made to the SRP would be prospective only, having no effect upon retirees such as petitioner.

I. An examination of the relevant portions of the agreements (SRP and Agreement) between ASARCO and petitioner reveals that the portion of the payments attributable to these agreements qualifies as an annuity. It is paid in money only and at regular intervals, monthly, to petitioner for life. The rate (\$10,829.00 of the monthly total of \$21,336.00) remains uniform and petitioner's right to receive the payments at issue is evidenced by two written instruments executed by his employer (ASARCO). Accordingly, by virtue of the foregoing, it is determined that the portion of the payments attributable to the SRP and Agreement are properly excludible from petitioner's New York adjusted gross income and wages allocable to New York City for 1986 and 1987.

J. The petition of Charles F. and Lois L. Barber is granted and the notices of deficiency, dated July 23, 1990, are to be modified accordingly.

DATED: Troy, New York  
December 16, 1993

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE